Editor's note: Reconsideration granted; decision set aside -- See 84 IBLA 174 (Dec. 19, 1984)

SIERRA CLUB
THE MONO LAKE COMMITTEE

IBLA 83-543 Decided March 1, 1984

Appeal from decision of the California State Office, Bureau of Land Management, dismissing protest of a decision to lease competitively certain lands in the Mono-Long Valley, Mono County, California, for geothermal steam and associated geothermal resources. CA 12705.

Set aside and remanded.

1. Environmental Quality: Environmental Statements -- National Environmental Policy Act of 1969: Environmental Statements

   The National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C) (1976), requires preparation of an environmental impact statement whenever a proposed major Federal action will significantly affect the quality of the human environment.

2. Environmental Quality: Environmental Statements -- National Environmental Policy Act of 1969: Environmental Statements

   The test for determining the extent to which treatment of a subject in an environmental impact statement for a multistage project may be deferred depends on two factors: (1) whether obtaining more detailed useful information is "meaningfully possible" at the time when the environmental impact statement for an earlier stage is prepared, and (2) how important it is to have the additional information at an earlier stage in determining whether or not to proceed with the project.

3. Environmental Quality: Environmental Statements -- National Environmental Policy Act of 1969: Environmental Statements

   Where a multistage project can be modified or changed in the future to minimize or eliminate environmental

hazards disclosed as a result of information not presently available, and where the Government reserves the power to make such modification or change thereafter, deferment of analysis of that unavailable information does not violate the National Environmental Policy Act.

4. Environmental Quality: Environmental Statements -- National Environmental Policy Act of 1969: Environmental Statements

When a proposed action is a critical agency decision which will result in irreversible and irretrievable commitments of resources to an action which will produce a significant impact on the environment, an environmental impact statement is required.

5. Geothermal Leases: Environmental Protection: Generally
Where BLM adopted a staged leasing approach to environmental review for a geothermal lease sale in the Mono-Long Valley Known Geothermal Resources Area, but the record contains ambiguities and inconsistencies concerning the exploration and development rights to be granted and the limitations to be placed on leases to be issued in that area and the notice of lease sale did not contain a "conditional stipulation," the decision dismissing a protest to the sale will be set aside and the case remanded to allow BLM to clarify its intent concerning the proposed leasing.

APPEARANCES: Julie E. McDonald, Esq., and Laurens H. Silver, Esq., Sierra Club Legal Defense Fund, Inc., San Francisco, California, for appellants.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Sierra Club and the Mono Lake Committee have appealed from a decision of the California State Office, Bureau of Land Management (BLM), dismissing their protest of the BLM decision to lease for geothermal exploration and development more than 85,000 acres of public land in Mono-Long Valley Known Geothermal Resources Area (KGRA) in California.

On September 9, 1981, the Secretary of the Interior directed that all unleased KGRA parcels be reviewed, and, if appropriate, offered at competitive lease sales by September 1982. As a result, BLM prepared an environmental assessment entitled "Final Environmental Assessment-Geothermal Preleasing -- Mono-Long Valley Area" (EA), dated May 1982, of the proposed action to lease approximately 105,000 acres of public lands to explore and develop geothermal resources in the Mono-Long Valley KGRA. 1/ On July 21,

1/ The EA at pages 6-8 states:

"The lands proposed for leasing under this action are shown on the Location Map designated as Figure 1-1. The major portion of these lands
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1982, the California State Director concurred in the decision which (1) found that the EA adequately addressed the impacts and that an environmental impact statement (EIS) was not needed for this action; and (2) authorized leasing of approximately 85,000 acres. 2/ BLM issued a notice of sale of geothermal leases in the Mono-Long Valley KGRA and three other KGRA's on August 27, 1982. Appellants filed an appeal. The State Director treated the appeal as a protest under 43 CFR 4.450-2 and dismissed it in a decision dated March 21, 1983.

BLM, in dismissing appellants' protest, stated that since post-lease development 3/ of the surface is conditioned on approval of surface disturbing activities by BLM and the lessee is required to comply with all terms, stipulations, pertinent regulations, and geothermal resource operational (GRO) orders, it is in compliance with regulations on tiering and not in violation of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C) (1976). 4/ The BLM decision stated further:

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fn. 1 (continued)
within the Mono-Long Valley Known Geothermal Resources Area (KGRA) (see Figure 1-2). Public lands proposed for leasing within the KGRA include approximately 84,950 acres of Federal ownership, 2,978 acres of private surface/Federal minerals ownership, and about 17,000 acres of relicted lands around Mono Lake. The relicted land acreage figure was supplied by Bruce Kuebler, Los Angeles Department of Water and Power (telephone communication, May 3, 1982). An additional 482 acres of lands under Federal ownership outside the KGRA are under application of noncompetitive leasing and are evaluated in this EA."

2/ The approximately 20,000 acres that were not approved for leasing consist primarily of the relicted lands surrounding Mono Lake (17,000 acres whose ownership is in litigation) and the islands within the Lake. An additional 2,400 acres scattered over the entire study area were withheld from leasing.

3/ Post-lease procedures are described in 30 CFR Parts 270-71, 43 CFR Parts 3200-3250 and Geothermal Resources Operational Orders (EA App. III). These are incorporated by reference in the standard geothermal lease, section 8 (EA App. II).

4/ "Tiering" is defined in 40 CFR 1508.28 as:

"Tiering" refers to the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared. Tiering is appropriate when the sequence of statements or analyses is:

"(a) From a program, plan, or policy environmental impact statement to a program, plan, or policy statement or analysis of lesser scope or to a site-specific statement or analysis.

"(b) From an environmental impact statement on a specific action at an early stage (such as need and site selection) to a supplement (which is preferred) or a subsequent statement or analysis at a later stage (such as environmental mitigation). Tiering in such cases is appropriate when it helps the lead agency to focus on the issues which are ripe for decision and exclude from consideration issues already decided or not yet ripe."

> [A]n EIS may not be required for activities that are "not meaningfully possible" to assess at the time an environmental analysis is begun * * * and where detailed environmental reviews consider the full nature of the actions at a later time; provided, however, that stipulations are attached to the lease indicating that satisfactory compliance with NEPA will be given at the time that post lease activities are environmentally reviewed.

(Protest Decision at 2). BLM then concluded that in this case the EA provided for such a detailed post-lease environmental review. BLM further stated that although there might be unavoidable environmental impacts if exploration or development should occur under the lease, these impacts could be mitigated to lessen or eliminate their "significance" so the proposed action to lease was not a major Federal action which would have a "significant" effect on the environment. Finally, BLM indicated that compliance with the National Historic Preservation Act, would, properly be afforded at the post-lease activity stage and that leasing was merely an administrative action. 5/

Appellants argue on appeal that geothermal leasing in the Mono-Long Valley KGRA requires preparation of an EIS, because it is a "major Federal action significantly affecting the quality of the human environment." See 42 U.S.C. § 4332(2)(C) (1976). 6/ First, appellants assert that BLM's reliance on post-lease environmental review to avoid preparation of an EIS is erroneous, because BLM has not limited the lessee's rights conveyed by the lease, nor reserved its right to deny development of the lease. In addition, appellants argue that BLM's reliance on mitigation measures proposed in the EA does not eliminate the EIS requirement, because BLM does not convincingly establish that the mitigation completely compensates for any possible adverse environmental impacts permitting a determination that such impact as remains, after the mitigation, is not significant. Appellants then assert that BLM has not complied with the National Historic Preservation Act, because BLM did not undertake the consultation and identification of cultural properties and adverse impacts preceding the leasing decision as required by the Act and its regulations under 36 CFR Part 800.

[1] NEPA requires preparation of an EIS whenever a proposed major Federal action will significantly affect the quality of the human environment. 42 U.S.C. § 4332(2)(C) (1976). To determine the nature of the environmental impact from a proposed action and whether an EIS will be required, BLM prepares an EA. See 40 CFR 1501.4(b), (c) (1982). On the basis of the EA,

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5/ The National Historic Preservation Act requires the head of each Federal agency to examine the effects of Federal "undertakings" on registered and eligible properties of historical, architectural, archaeological or cultural significance and to afford the Advisory Council on Historic Preservation a reasonable opportunity to comment. 16 U.S.C. § 470f (1976). BLM stated in its decision at page 3 that "leasing is not an 'undertaking.'"

6/ Appellants state that Mono Lake is "an area whose beauty, ecological significance, and fragility have attracted extraordinary public concern," citing National Audubon Society v. Superior Court, 180 Cal. Rptr. 346, 658 P.2d 709 (1983). Statement of Reasons at 2.

BLM determines whether the proposed action is a critical agency decision which will result in an irreversible and irretrievable commitment of resources to an action which will produce a significant impact on the environment.

Here, BLM determined that the proposed action of issuing geothermal leases on approximately 85,000 acres in the Mono-Long Valley KGRA would produce no significant impact on the environment. BLM stated in its decision on the protest that since it will continue its environmental review process after issuing the leases, it is tiering the environmental analysis in compliance with BLM Instruction Memorandum No. 80-198, based on an opinion by the Associate Solicitor, Energy and Resources, dated June 13, 1979, titled "'Staged Leasing' of Geothermal Resources," and the law as enunciated in County of Suffolk v. Secretary of the Interior, 562 F.2d 1368 (2d Cir. 1977). Under the tiering or staging concept, BLM indicated it was only authorizing "casual use," 7/ which permits no significant surface disturbing activity until additional approval is given. It also stated that it was deferring the balance of the analysis to a later stage when it would be more meaningfully possible to assess the environmental impacts of the exploration and development of the geothermal leases.

Appellants disagree with BLM's conclusion and assert that BLM made the critical agency decision at the time it decided to issue the geothermal leases.

[2] County of Suffolk, supra, which is relied upon in the BLM decision, examines the extent to which treatment of a subject in an EIS for a multistage project may be deferred. The court concluded that two factors determine whether deferral is appropriate, (1) whether obtaining more detailed useful information on the deferred stage is "meaningfully possible" at the time when the EIS for an earlier stage is prepared, and (2) how important it is to have the additional information at an earlier stage in determining whether or not to proceed with the project. County of Suffolk, supra at 1378. In that case, plaintiffs had challenged the Department's Outer Continental Shelf lease sale EIS as defective for not adequately discussing pipeline transportation routes from the lease sale tracts to onshore sites. The Second Circuit Court of Appeals first observed that, although it would be possible to project hypothetical routes, such information would be virtually useless speculation for environmental impact purposes, because of several uncertainties including the size and location of any future oil discovery, its distance from shore, the type of oil discovered, its final destination and the character of ocean bottom. Id. at 1378-80. The court found that projection of specific pipeline routes was not "meaningfully possible." 8/

7/ "Casual use" activities involve the use of small field crews and lightweight vehicles on existing roads and trails. No off-road vehicle use would occur during this activity. These activities generally do not result in significant impacts to the environment. Examples of these types of activities are topographic and geologic mapping, geochemical surveys and geophysical surveys without the use of explosives (EA at 8).

8/ The EIS did consider transportation questions generally, but deferred consideration of specific locations until the development stage EIS.

Second, the Court of Appeals examined the continuing scrutiny and involvement of the Secretary in the development phase of these oil and gas leases and determined that the information was not reasonably necessary at the time of lease sale. Id. at 1380. 9/ In reaching this conclusion, the court examined at some length the Secretary's approval authority over each future step. Id. at 1381-82.

[3] The court in County of Suffolk, supra, concluded that where a multistage project can be modified or changed in the future to minimize or eliminate environmental hazards disclosed as a result of information not presently available (including suspending operations until a technology is developed under which the use of pipelines is feasible), and the Government reserves the power to make such modification or change thereafter, then deferment of analysis of that unavailable information does not violate NEPA. BLM apparently believes that its actions to issue the proposed geothermal leases are in keeping with County of Suffolk, supra.

[4] The Associate Solicitor's opinion on which BLM relies specifically discusses staged leasing and the impact of Sierra Club v. Hathaway, 579 F.2d 1162 (9th Cir. 1978). That case concerned geothermal leasing in the Alvord Desert KGRA in Oregon. The court denied a request for a preliminary injunction to prevent the Secretary of the Interior from executing leases in the KGRA or to restrain any lessee from undertaking any rights granted by a lease. The Department had completed a nationwide programmatic EIS and an environmental analysis record for the Alvord Desert KGRA program. The court held that neither BLM nor Geological Survey had made the "critical agency decision" that immediately precedes the point where there will be "irreversible and irretrievable commitments of resources" to the action affecting the environment. Id. at 1168. The holding was based on the rationale that the development and production of geothermal resources involved several phases, the first of which was exploration and that the EIS in the proposed action was only analyzing the first step in the exploration phase, casual use, which "involves practices which do not ordinarily lead to any appreciable disturbance or damage to lands, resources, and improvements." Id. at 1165. Further, the court stated, "A lessee is initially prohibited from entering leased lands for any purpose other than casual use, and may undertake further exploration operations only after submitting a detailed plan of operations and obtaining approval * * *." Id. at 1165. The court went on to point out that the district court had demanded monthly reports detailing the ongoing exploration activities and that BLM and the lessees were bound by lease provisions and regulations that could result in termination. It is, however, important to note that this decision stressed that its review was limited to the propriety of the denial of injunctive relief and intimated no review regarding the merits of the underlying controversy. Id. at 1166.

The Associate Solicitor states, commenting on the case, "Explicit in that ruling is that no activity may occur on a geothermal lease without separate, prior approval by BLM or Geological Survey. Implicit is the concept that the Secretary can refuse, on the basis of information contained in a

9/ The Department had committed itself to doing an EIS at the development stage in those leases that reached such a stage.

post-lease EIS, to approve any post-exploration activity" (Opinion at 2). The Associate Solicitor then recommends that

> the Department insert in the standard geothermal lease form a provision which expressly provides first, that a lessee can develop a lease only upon further approval by the Secretary of an acceptable development plan; and second, that failure to win Secretarial approval will mean termination of the lease after its ten-year term has run out unless the lessee gains Secretarial approval of an acceptable plan prior to that date, or the lease is suspended.

(Opinion at 6-7). Further, the Associate Solicitor specifically suggests that an express lease term be added providing that the lessee, by signing the lease, acknowledges that the property right conveyed by the lease is limited and that without further approval the lease may expire without exploration or development beyond the "casual use" stage.

Appellants argue, however, that BLM did not follow the recommendations of the Associate Solicitor or the Instruction Memorandum issued as a result of that opinion. In fact, appellants assert that BLM's reliance on post-lease environmental review to avoid preparation of an EIS is erroneous precisely because BLM did not explicitly limit the lessee's rights to explore and develop conveyed by the lease nor did BLM reserve its right to deny development of the lease.

A recent court case, published after this appeal was filed, is supportive of the need explicitly to limit a lessee's rights and explicitly reserve the Department's rights to preclude further exploration or development in a leasing context. Sierra Club v. Peterson, 717 F.2d 1409 (D.C. Cir. 1983), involved a suit challenging the issuance of oil and gas leases without no-surface occupancy stipulations on lands within two national forests on the basis that there was a failure to prepare an EIS. 10/ In ruling for Sierra Club the court held:

> To comply with NEPA, the Department must either prepare an EIS prior to leasing or retain the authority to preclude surface disturbing activities until an appropriate environmental analysis is completed. If the Department retains the authority to preclude all surface disturbing activities pending submission of a lessee's site-specific proposal as well as the authority to refuse to approve proposed activities which it determines will have unacceptable environmental impacts, then the Department can defer its environmental evaluation until such site-specific proposals are submitted. If however, it is unable to preclude activities which

10/ Although this case involves a leasing act other than the Geothermal Steam Act, the authority granted the Secretary is sufficiently analogous to make the case instructive. Further, the Associate Solicitor's opinion, relied on by BLM and Solicitor's Opinion, Geothermal Leasing in Designated Wilderness Areas, 88 I.D. 813 (1981), both analogize other leasing act cases to the Geothermal Steam Act situation.

> might have unacceptable environmental consequences, then the Department cannot issue leases sanctioning such activities without first preparing an EIS. [Emphasis in original.]

Sierra Club v. Peterson, supra at 1415. The court indicated that retention of the ability to "mitigate" environmental damage or enforce lease stipulations to "control" environmental damage would not be sufficient.

[5] In light of the relevant authorities discussed above, the Board has reviewed the record and appellants' contentions. We disagree with appellants' assertion that an EIS is necessary prior to geothermal leasing in the Mono-Long Valley KGRA. An EIS is not necessary prior to leasing if, in fact, BLM has properly adopted the staged leasing concept. BLM stated in its protest decision at 2: "In the instant case, the EA, as contained in the Recommended Notice to Lessee (pg. 43), provides for such a detailed post lease environmental review in conformance with the guidelines in W.O. 80-198 and Associate Solicitor's Opinion, June 13, 1979."

The difficulty in this case, however, is determining exactly what has been done by BLM. On the one hand, BLM seems to say that the lessee will have a right to expect normal development of a lease. The EA states at page 1, "A geothermal lease provides the lessee with the implied right to explore, develop, and utilize (if a discovery is made) the public land for its geothermal resources." The EA further states at page 5, "Any lease issued will establish rights to explore for, develop, and use the geothermal resources on the lands leased." That statement is conditional, however. The next sentence states that "specific activities will not be approved which would cause unmitigable and unacceptable impacts on other land uses or resources." Likewise, the geothermal resources lease sale notice contains the following language at paragraph 6:

> The lessee in accepting a lease understands that the surface management agency has reviewed existing information and planning documents and except as otherwise noted in special stipulations, knows of no reason why normal development cannot proceed on the leased lands. However, specific development activities could not be considered prior to lease issuance since the nature and extent of the geothermal resource were not known and specific operations have not been proposed. The lessee is hereby made aware that, consistent with 30 CFR 270.12, all post-lease operations will be subject to appropriate environmental review and may be limited or denied, but only if unmitigable and unacceptable impacts on other land uses or resources would result. [11]

It is not entirely clear whether a lessee would have the right to develop the geothermal resources or whether BLM can deny the lessee the right to develop and use the land if BLM determines that the impacts are environmentally unacceptable. The BLM decision on the protest states at page 2 that

11/ This same language was included in the EA at page 43 as part of a "Recommended Notice to Lessees" and also in the EAR Decision Record at page 4.

"[p]ost lease development of the surface is conditioned on approval of surface disturbing activities, by [BLM]." The authorities cited previously indicate that precluding surface disturbing activities would allow deferral of environmental review, but that only reserving the authority to impose reasonable mitigation measures would not. The EA states at page 6, "Reasonable precautions will be taken to prevent or mitigate adverse impacts of important resources and values."

We have cited these various BLM pronouncements to point out that ambiguities have been created as to the intent of BLM with respect to the proposed leasing and that such ambiguities have not been clarified on appeal.

A bidder for a geothermal lease should be entitled to clear notice of what the nature of the rights and privileges under a lease will be. The Associate Solicitor stated at page 7 of his opinion:

> A lease term could also be added expressly providing that the lessee, by signing this lease, acknowledges that the property right conveyed by the lease is limited, that approval of operations must be secured prior to development, and that if approval is not obtained, the lease may expire at the end of a ten-year term without the lessee having any right to compensation. This would further ensure that the lessee understands and accepts the provision. [Emphasis added.]

In addition, the instruction memorandum relied upon by BLM, Instruction Memorandum No. 80-198, dated January 3, 1980, provides at page 2, "Staged leasing * * * requires acceptance by the applicant of a 'conditional development' stipulation. You are directed to use the enclosed special stipulation when issuing a staged lease * * *." 12/

12/ The stipulation reads as follows:

"Conditional Development Stipulations for Geothermal Leases

"A prelease environmental review directed primarily at casual use and exploration activities that cause only minimal surface disturbance has been completed for this lease. Such activities may be conducted subject to an approved plan of operation where required by regulation. More intensive (and more surface disturbing) exploration and testing activities necessary to establish the location and reservoir characteristics of geothermal resources covered by this lease will be subject to a supplemental environmental review which will consider primarily those impacts associated with that stage of development, including those activities proposed at the time a plan of operations is submitted. Following approval of the initial intensive exploration or testing application, the lessee may continue to explore and test upon the leased lands subject to plan of operation approvals. Subsequent operations involving the commercial development and utilization of the geothermal resource will be contingent upon an approved environmental analysis and/or EIS and approval of a plan of production and utilization.

"Operations at any stage of development may be denied or limited if:

"a) Development is determined to prevent or hinder unnecessarily the multiple uses of the leased lands as defined in the Federal Land Policy and

BLM instruction memoranda and BLM organic act directives are binding on BLM. Utah Wilderness Association, 72 IBLA 125 (1983); Margaret A. Ruggiero, 34 IBLA 171 (1978). Instruction Memorandum No. 80-198 directed the inclusion of a "conditional stipulation" in a staged lease situation. 13/ In this case the notice to lease contained language that arguably conditioned leasing on subsequent environmental reviews. The notice, however, did not contain a conditional stipulation. Thus, because BLM has adopted staged leasing for the Mono-Long Valley KGRA, but it has not included a conditional stipulation in its notice to lease and its intent with respect to use and development of a lease is unclear from the record, we must set aside the BLM protest decision and remand the case to allow BLM to clarify its intent with respect to leasing in the Mono-Long Valley KGRA.

We note that the lease sale notice, the EA, and the protest decision, all state that all post-leasing operations will be subject to appropriate environmental review. 14/ However, as appellants point out, subsequent to preparation of the EA in this case, the Department adopted for BLM certain "categorical exclusions" from environmental review pursuant to 40 CFR 1507.3(b)(2)(ii) and 40 CFR 1508.4. 47 FR 50368 (Nov. 5, 1982). The specific exclusions cited by appellants are:

> (6) Approval of Notices of Intent to conduct geothermal resources exploration operations pursuant to 43 CFR Part 3209.
>
> (7) Approval of a plan of operation for geothermal exploration or development when an environmental document has been prepared at the leasing stage.
>
> (8) Approval of a plan for injection of geothermal fluids meeting the standards of GRO-4 (Environmental Protection Requirements).

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fn. 12 (continued)
Management Act (43 U.S.C. § 1702 (c)). This determination will be made only if there are no acceptable mitigation measures or alternative locations available for proposed operations within the leased lands; or,

"b) Development precludes the eventual restoration of the leased land to a resource character and level of use or productivity reasonably equivalent to the prelease state or its natural condition; or

"c) Other laws preclude such operations.

"If a plan of operation is rejected under the foregoing conditions the lessee may apply for a suspension of operations or a waiver or modification of rentals and royalties in accordance with applicable regulations. If approval of a suspension of operations is not granted, this lease may expire at the end of the primary term, without the lessee having any right to compensation from the lessor."

13/ Although the instruction memorandum contains an expiration date of Nov. 30, 1981, since BLM cited it in its Mar. 21, 1983, protest decision as a partial basis for its action in this case, we must assume that the effectiveness of the memorandum was extended beyond the expiration date.

14/ The EA actually states at page 6 that, "Post-lease operations where an EA is necessary are conditioned upon the lessee's preparation of a detailed Plan of Operations for each of step of geothermal development * * *."

> (9) Approval of a plan for geothermal production when derived from a plan of utilization which has been covered by an environmental document.

(Statement of Reasons at 16). See 47 FR 50372 (Nov. 5, 1982)).

Most troublesome, herein, is exclusion number 7. Excluding the approval of a plan of operation for geothermal exploration or development when an environmental document (an EA in this case) has been prepared at the leasing stage would undercut completely the rationale for the staged leasing concept for geothermal leasing in this case. The justification for not preparing an EIS at the leasing stage in this case was that sufficient environmental reviews would be undertaken at subsequent stages. However, now the Department has established a categorical exclusion for plan of operation approval. This inconsistency should be addressed on remand.

Appellants have also charged that BLM failed to comply with the National Historic Preservation Act. The EA Decision Record includes sections on pages 4 and 5 relating to cultural resources. 15/ The thrust of those sections and the responses given by BLM in its protest decision to specific charges by appellants is that BLM will comply with that Act at the appropriate time. BLM believes that it is not necessary to comply fully with the requirements of 36 CFR Part 800 at the initial leasing stage. Such an approach would not appear to be unreasonable in a staged leasing situation. However, since we

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15/ The EA Decision Record states:

"The lessee should be aware that Federal agencies shall not authorize actions resulting in impacts to significant cultural resources without first meeting the legal requirements of E.O. 11593 and the National Historic Preservation Act of 1966 (as amended), promulgated in regulations set forth in 36 CFR Part 800. The legal responsibilities of the Bureau of Land Management pertaining to the cultural resources program may be time-consuming and could result in operational delays to the lessee. The lessee can expedite approval of field operations by engaging the services of a qualified, professional archaeologist or archaeological consultant firm which has a valid Antiquities Permit for the project area, (meets approval of the BLM Authorizing Officer), for the purpose of including a certified record of archaeological inventory of all lease lands subject to surface disturbing activities related to lease operations. Plans for the avoidance of cultural resources should be included in records of inventory where appropriate." (EA Decision Record at 4.)

"Cultural Resources shall be avoided during all lease operations until the legal compliance procedures set forth in 36 CFR Part 800 have been met, and an adequate mitigation program has been devised according to the procedures of 36 CFR Part 800 and the agreement related to Geothermal Lease Operations signed by BLM and USGS June 22, 1978 (Appendix X). Specific guidance to the required operational procedures for cultural resources on lease lands subject to surface disturbance are found in Section 7 of GRO 4, Section 18 of Form 3200-21, and the Cooperative Procedures Related to Geothermal Lease Operations signed by BLM and USGS (MMS) on June 22, 1978 (Appendix X). These procedures shall be followed subject to the limitations of cultural resource avoidance noted in this stipulation." (EA Decision Record at 5.)

are remanding this case so that BLM may clearly express its position with respect to this proposed lease sale, BLM should also set forth, so that potential lessees are fully aware, the cultural resource ramifications of leasing. We say this because although the EA Decision Record contains the language quoted in footnote 13, no such language appears in the August 27, 1982, notice to lease. Thus, if a potential lessee were to rely on the leasing notice, such a person might not be aware, as stated in the EA Decision Record, that "[t]he legal responsibilities of the Bureau of Land Management pertaining to the cultural resources program may be time-consuming and could result in operational delays to the lessee." It would seem that fairness would dictate that potential lessees be put on notice of such requirements, and that such notice not be buried in an EA Decision Record, but that the requirements be specifically addressed in the sale notice or in relevant stipulations incorporated in the sale notice. Cf. In Re Lick Gulch Timber Sale, 72 IBLA 261, 292-93, 90 I.D. 189 (1983) (mitigating measures provided for in the environmental analysis record were not replicated in timber sale contract).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM's decision denying appellants' protest is set aside and this case is remanded to BLM for further action not inconsistent with this opinion.

Bruce R. Harris
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge